UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION

MDL NO. 1456

CIVIL ACTION: 01-CV-12257-PBS

THIS DOCUMENT RELATES TO: ALL ACTIONS

Hon. Patti B. Saris

FILED UNDER SEAL

DEY'S INDIVIDUAL MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY CLAIMS WITH RESPECT TO TRACK 2 DEFENDANTS

[REDACTED VERSION]

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Attorneys for Dey, Inc.

Of Counsel:

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Defendant Dey, Inc. ("Dey") respectfully submits this memorandum in opposition to Plaintiffs' Motion to Certify Claims with respect to Dey. For the reasons set forth in the Track Two Defendants' Memorandum In Opposition To Class Certification, the motion for certification should be denied. In addition, since Plaintiffs fail to propose a single class representative with standing to sue Dey, Plaintiffs' motion should be denied as to Dey for this independent reason as well.¹

I. SUMMARY OF ARGUMENT

As to Class 1, Plaintiffs propose two individuals – Hunter G. Walters and Harold Bean – as representatives.² None of the evidence proffered by Plaintiffs demonstrates a single payment by Mr. Walters for Dey's drugs, based on average wholesale price ("AWP") or otherwise. Not only is there no evidence Mr. Walters paid on the basis of Dey's AWP, the evidence in the record discloses that Mr. Walters was the beneficiary of a program, provided by his mail order pharmacy , which he applied for at the start of his relationship with the pharmacy. Under the terms of this program, Mr. Walters was only obligated to make flat co-payments for his medication. He was not obligated to make the 20% Medicare co-insurance payment. As the proposed Class 1 definition excludes persons who made flat co-payments, Mr. Walters may not serve as a Class 1 representative for this reason alone.

Plaintiffs ask the Court to put aside the evidence which shows that

and assume that Mr. Walters made a single

AWP-based payment for Dey's products because he

Documents cited herein as "Walters _____" are annexed, in Bates number order, as Ex. A to the accompanying Declaration of Philip D. Robben, dated June 15, 2006 ("Robben Decl."). Transcript pages cited herein as "Walters Tr. ____" are annexed as Ex. B to the Robben Decl.

On June 8, 2006, the Court allowed Plaintiffs to add Mr. Bean as a proposed class representative. No discovery has been taken of Mr. Bean. Plaintiffs have not met their burden of establishing that Mr. Bean paid for a Dey drug based on AWP. However, Dey will serve its opposition to Mr. Bean serving as a Class 1 representative at an appropriate time after discovery as to Mr. Bean is complete.

However, there is simply no evidence which demonstrates what the was for or what the basis for it was (AWP-based or otherwise). Plaintiffs' other arguments similarly require the Court to make assumptions and draw conclusions not supported by the evidence. Since Plaintiffs cannot prove that Mr. Walters made payments for Dey's drugs on the basis of Dey's AWP, Plaintiffs cannot show that Mr. Walters has standing to serve as a class representative with respect to Dey.

Plaintiffs' other proposed class representatives, Sheet Metal Workers National Health Fund ("Sheet Metal") (Class 2) and Pipefitter's Local Union 357 Trust Funds ("Pipefitters") (Class 3), also lack standing at to Dey. At best, Plaintiffs' submission evidences payments by these entities for generic drugs manufactured not only by Dey but also other companies. Nothing in Plaintiffs' proffer shows that the drugs these entities allegedly paid for were, in fact, manufactured by Dey. Thus, these entities lack standing and may not serve as class representatives against Dey.

II. ARGUMENT

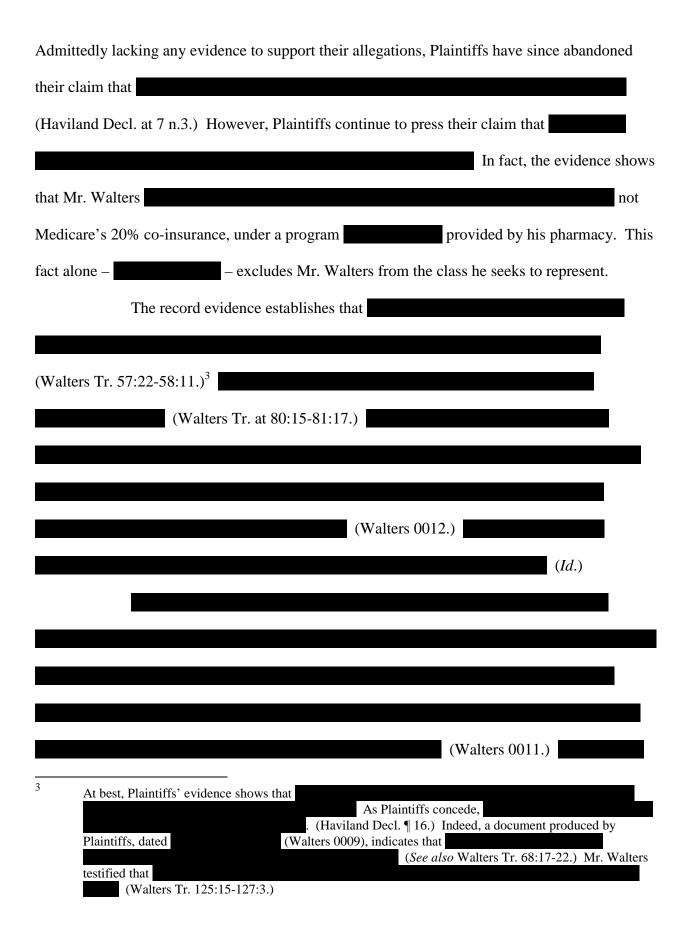
As this Court previously held, "Plaintiffs must establish that there is an individual class representative with standing to sue each defendant." In re Pharm. Indus. Average

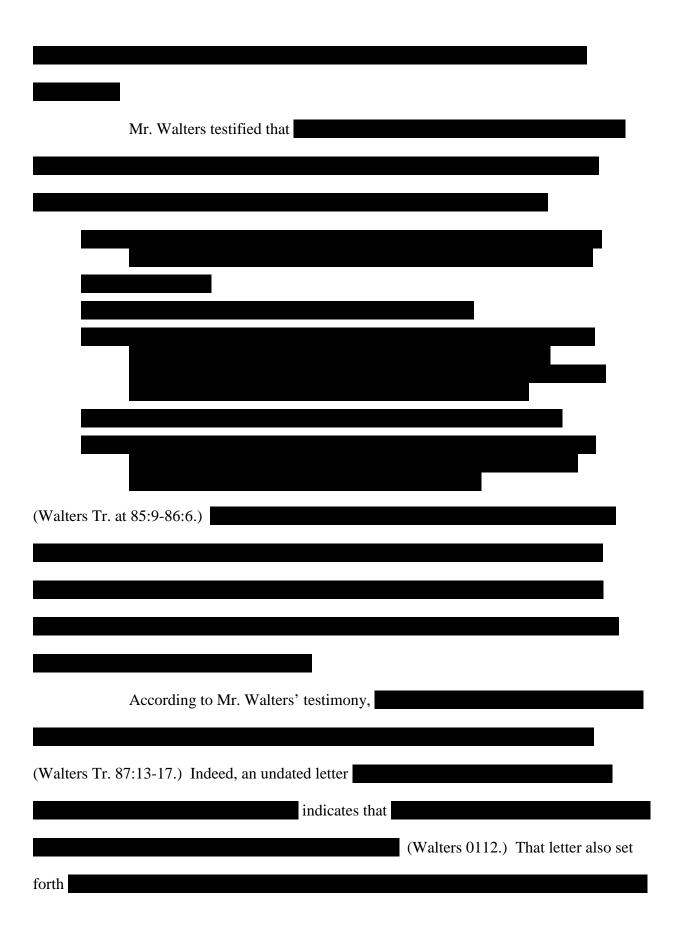
Wholesale Price Litig., 230 F.R.D. 61, 80 (D. Mass. 2005) (emphasis added). In this context, standing requires proof of payments on the basis of AWP: where the "named class representatives made no payments based on AWP," they are "not a member of the class" they seek to represent. Id. Thus, Plaintiffs must show that each proposed class representative against Dey paid for a drug supplied by Dey during the class period at a price based on Dey's AWP.

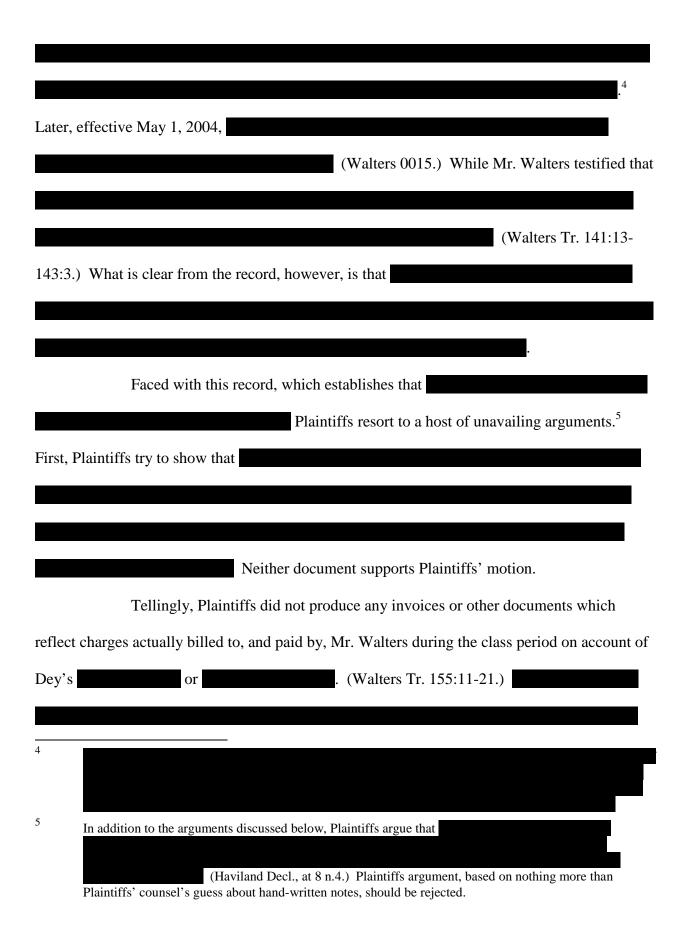
A. Mr. Walters Lacks Standing to Serve As A Class Representative Against Dey

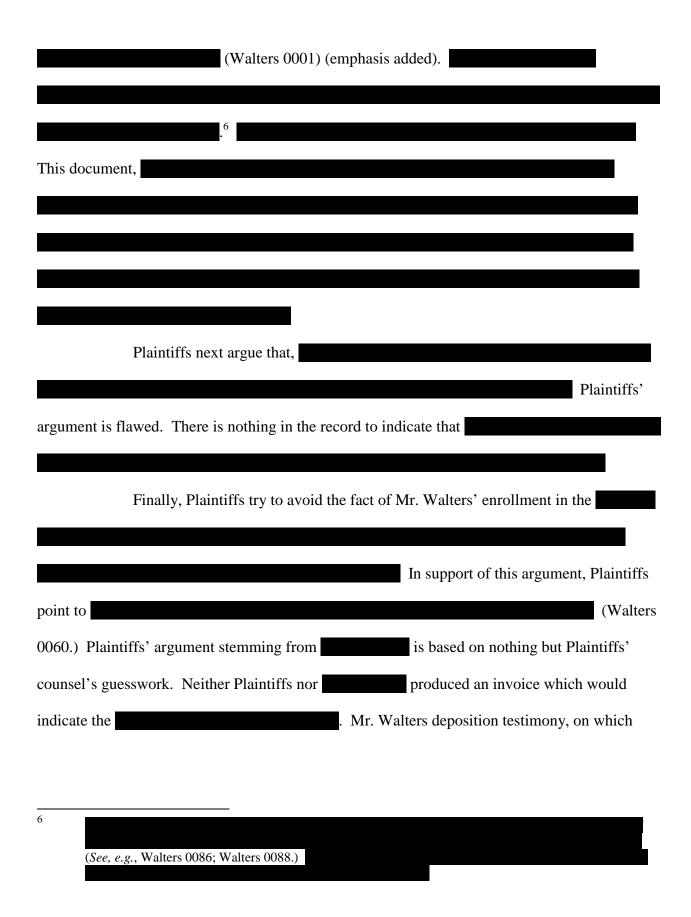
Plaintiffs allege that, during the class period, Mr. Walters was charged based on

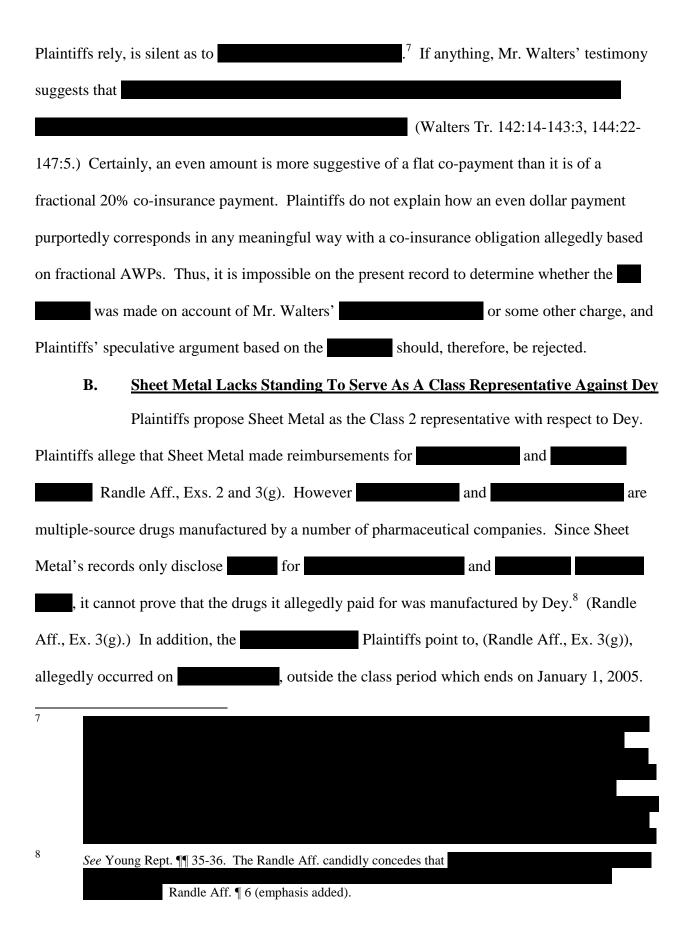
AWP for manufactured by Dey. (See FAMCC ¶ 24.)











See Proposed Order, § III.1. Since Sheet Metal cannot establish it paid for Dey's drugs, Plaintiffs cannot show that Sheet Metal has standing with respect to Dev.

C. Pipefitters Lacks Standing To Serve As A Class Representative Against Dev

Plaintiffs propose Pipefitters as their Class 3 representative. They allege – in summary fashion, only by means of a conclusory chart – that Pipefitters made AWP-based . (Hannaford Decl., Ex. 1.) The Pipefitters data Plaintiffs payments for produced, however, suggests, at best, that Pipefitters made for and Pipefitters' records contain no indication of the source of this Pipefitters allegedly paid for was manufactured by Dey. Since Pipefitters does not have standing with respect to Dey, it cannot serve as a representative of Class 3 against Dey.

III. **CONCLUSION**

For the reasons set forth above, Dey respectfully requests that this Court deny the Plaintiffs' Motion to Certify Claims with respect to Dey.

Dated: June 15, 2006

Respectfully submitted,

KELLEY DRYE & WARREN LLP

By: /s Philip D. Robben

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served upon the following attorneys for the Plaintiffs at the address designated by them for service of papers:

Thomas M. Sobol, Esq. Hagens Berman Sobol Shapiro LLP One Main Street, 4th Floor Cambridge, MA 02142 Donald E. Haviland, Jr. Kline & Specter, P.C. 1525 Locust Street, 19th Floor Philadelphia, PA 19102

by depositing true and correct copy of the foregoing document enclosed in a prepaid, sealed wrapper, in an official depository under the exclusive care and custody of the United States Post Office, within the State of New York, on June 15, 2006.

/s Peter Boiko
PETER BOIKO